Editor's note: 86 I.D. 342

FRANK RULLAND

IBLA 76-299 Decided June 27, 1979

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting in part Native allotment application F-14641.

Set aside and remanded.

1. Administrative Procedure: Generally -- Alaska: Native Allotments -- Contest and Protests: Generally -- Hearings -- Rules of Practice: Government Contests

   Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 et seq.

2. Alaska: Native Allotments -- Alaska: Navigable Waters -- Alaska: Statehood Act -- Alaska: Tidelands -- Public Lands: Generally -- Submerged Lands -- Submerged Lands Act: Generally

   Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act.

The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

APPEARANCES: Carmen L. Massey, Esq., Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Frank Rulland has appealed from a decision, dated September 16, 1975, of the Fairbanks District Office, Bureau of Land Management (BLM), which rejected in part his Native allotment application F-14641, which had been filed pursuant to the Alaska Native Allotment Act, ch. 2469, 34 Stat. 197 (1906) (repealed 1971). The decision considered appellant's applications for two parcels of land. Appellant's application for Parcel A included 125 acres, but the District Office found that Mr. Rulland was only using a small part of Parcel A and allowed only 40 acres. The District Office rejected the application for Parcel B because the field report indicated that the land was completely under the water of the Beaufort Sea and that the land now belongs to the State of Alaska pursuant to the Alaska Statehood Act, 72 Stat. 339 (1958), which gave the State title to such submerged land as defined in the Submerged Lands Act, 43 U.S.C. §§ 1301-43 (1976).

[1] While this appeal was pending, the United States Court of Appeals for the Ninth Circuit ruled that "Alaska Natives who occupy and use land for at least five years, in the manner specified in the [Native Allotment] Act and the regulations," are entitled to due process in the adjudication of their applications for allotment of that land. Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976). The Department implemented this mandate by requiring BLM to initiate a contest giving an applicant notice of the charges against his/her application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application because of insufficient use and occupancy. Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). Those contest procedures are set forth at 43 CFR 4.451-1 to 4.452-9. In Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), the court held that these procedures comply with the due process requirements mandated in Pence v. Kleppe, supra. Consideration of appellant's appeal was stayed pending resolution of the issues raised in the Pence litigation.

The rejection of Parcel B and the partial rejection of Parcel A were predicated on factual determinations. The applicant has not had an opportunity to submit evidence on these factual issues at a hearing. The cases must therefore be remanded to the Bureau for readjudication. Where it is determined that the applications should still be rejected in whole or in part because of the failure of the record to establish the applicant's use and occupancy of the land as required

by statute and regulation, BLM should initiate a contest proceeding in accordance with our decision in Donald Peters, supra.

[2] With respect to Parcel B, appellant asserts that even if the land eroded, his claim of entitlement arising from his prior use and occupancy was preserved by various provisions of the Submerged Lands Act and the Alaska Statehood Act. 1/ He asserts that if his land

1/ Appellant points to a provision of the Alaska Statehood Act in which the United States and Alaska disclaimed right and title to land held by the United States in trust for the Natives. Appellant further cites a provision of the Submerged Lands Act, 43 U.S.C. § 1315 (1976), which provides that nothing in the statute shall affect rights which may have been acquired under any other law of the United States. He points to another provision, 43 U.S.C. § 1313(b) (1976), which excludes from those lands granted to a State any lands beneath navigable waters held for the benefit of any tribes, band, or group of Indians or for individual Indians. However, appellant has initiated no interest which is not subject to loss by erosion. Indeed, even if a patent had been issued while the land was fast land, title conveyed by the patent would be lost by erosion. The issue may be more fully appreciated if the basic law governing title to submerged land is set forth. It has been long recognized that prior to the admission of a state to the Union, the United States holds title to the lands beneath navigable waters in trust for the future state. Shivley v. Bowlby, 152 U.S. 1, 49 (1894); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Young v. Town of Juneau, 4 Alaska 372 (1911). When territories became states, they received title to submerged land just as the original states held title to their submerged lands. See Shivley v. Bowlby, supra. Thus, the Submerged Lands Act confirmed the title of submerged lands in existing states and defined the title that future states would acquire. Even though the land was kept in trust for future states, a number of cases recognize that prior to admission of the state, the Government may reserve lands beneath navigable waters so that they do not pass to the state upon attainment of statehood. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); United States v. City of Anchorage, 437 F.2d 1081 (9th Cir. 1971); Moore v. United States, 157 F.2d 760 (9th Cir. 1946). In each case, the court found an intent to reserve land beneath navigable waters in the instrument of conveyance or reservation. These cases contrast with the instant case where there is no instrument where such an intent can be found. As we noted in the body of the opinion, recognition of such an exception would not be consistent with the intent of the Native Allotment Act.

eroded, this occurred only after he had earned his right to it by use and occupancy and after he had filed his application. However, it is not by virtue of the legislation that the land is no longer subject to disposal under the Native Allotment Act. Rather, this result follows from the application of the common law principle that Federal title to public land may be lost by erosion. J. M. Jones Lumber Co., A-30761, 74 I.D. 417 (1967); see generally 65 C.J.S. Navigable Waters § 87 (1966). Courts have applied the concepts of erosion, accretion, and avulsion, making clear that these principles were not suspended by the Submerged Lands Act or the various statehood acts. See Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977); Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Hughes v. Washington, 389 U.S. 290 (1967). 2/ Such principles are no less applicable in Alaska. See Sandra L. Lough, 25 IBLA 96 (1976).

Furthermore, it would not be appropriate to assert that lands included in a Native allotment application are somehow excepted from the application of these common law principles. The type of use and

2/ Bonelli, supra, had held that Federal common law rather than State law was to be applied in a dispute between Arizona and a land holder in that State involving a question of title to land which had been the bed of a navigable river. Corvallis, supra, overruled Bonelli on this point, and held that state law rather than Federal law controlled. Corvallis does not preclude the application of Federal common law to lands bordering on oceans, see Hughes v. Washington, supra, or to questions of title to public lands. See David A. Provinse, 35 IBLA 221, 85 I.D. 154 (1978).

The only possibility that submerged lands might be retained in Federal ownership is if such lands were clearly embraced within a Federal withdrawal prior to and at the time of statehood. See Solicitor's Opinion, 86 I.D. 151 (1978).

occupancy which the Native Allotment Act sought to protect can no longer be enjoyed if the lands are submerged. Even if title to the land remain in the United States, this same reasoning would impel the rejection of the application pursuant to the Secretary's discretionary authority under the Native Allotment Act, because granting an allotment for submerged land would be inconsistent with the intent and purpose of that statute. If appellant disputes the factual determination that Parcel B is submerged, however, this factual issue may be considered at the hearing.

We are not ruling at this time on the adequacy of appellant's asserted use and occupancy as required by the Native Allotment Act. Resolution of legal issues related to that question will best be made after the hearing where all the facts have been ascertained. The facts should establish the type and extent of the use, whether others may have used and occupied the land, whether there may have been a failure to substantially continue to use or occupy land or an abandonment of the land by the applicant for a substantial period from the time asserted to the date of the application, and all other matters which would show the factual basis for ascertaining whether compliance with the preconditions for granting a Native allotment have been satisfied.

BLM should afford notice of the initiation of the contest proceedings to the State of Alaska and any other person or entity which may possibly have a conflicting interest in the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further adjudication.

Joan B. Thompson
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Newton Frishberg
Chief Administrative Judge